

Recovery Act Buy American Overview

Benjamin Goldstein
Buy American Coordinator for EERE

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American Recovery & Reinvestment Act

[EERE Recovery Act Home](#)

[Apply for Funding](#)

[Buy American Provision](#)

[Appliance Rebate
Program](#)

[Contacts](#)

Buy American Provision

This Web page contains guidance for financial assistance recipients regarding Buy American Recovery Act provisions under projects funded by the American Recovery and Reinvestment Act of 2009 and administered by the Office of Energy Efficiency and Renewable Energy (EERE).

The Buy American provision in the American Recovery and Reinvestment Act of 2009 (section 1605 of Title XVI), provides that, subject to three listed exceptions (nonavailability, unreasonable cost, and inconsistent with the public interest), none of the funds appropriated or otherwise made available by the Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all the iron, steel, and manufactured goods used are produced in the United States. The law also requires that this provision be applied in a manner consistent with U.S. obligations under international agreements.

Please check this page regularly, as the Office of Energy Efficiency and Renewable Energy will provide updates as further guidance is released.

New Guidance and FAQs

The following documents are available as Adobe Acrobat PDFs. [Download Adobe Reader](#).

- Guidance on Documenting Compliance with the Recovery Act Buy American Provisions ([PDF 136 KB](#))
- Guidance on Manufactured Goods and Substantial Transformation for Financial Assistance Awards ([PDF 122 KB](#))
- Recovery Act Buy American Guidance on Implementing the Agreement Between Canada and the United States of America on Government Procurement ([PDF 74 KB](#))
- International Trade Agreements and the Recovery Act Buy American Provisions: Frequently Asked Questions ([PDF 66 KB](#))
- Computer Hardware and Software: Frequently Asked Questions ([PDF 48 KB](#))

EERE Buy American Waivers

If DOE issues any waivers to the Buy American Recovery Act provisions, they will be published in the *Federal Register* within two weeks of issuance, posted on this Web page, as well as made available to the relevant EERE project and contracting officers.

- *Nationwide Nonavailability Waiver for 7 Items* ([PDF 207 KB](#))
- *De Minimis Public Interest Waiver* ([PDF 214 KB](#))
- *Nationwide Limited Public Interest Waiver for LED Lighting and HVAC Units* ([PDF 56 KB](#))
- *Nationwide Categorical Waivers for Electronic Ballasts, LED Traffic Lights, and CFLs* ([PDF 192 KB](#)).

Additional Information

For more information on the Buy American provision, please see the following documents.

- EERE Request for Information on Recovery Act Buy American Provisions ([PDF 152 KB](#))
This is a copy of what DOE submitted to the Federal Register for publication. Stakeholders should also refer to the Federal Register version when it is published.
- Guidance on the Buy American Provisions as Applied to EERE Projects funded by ARRA ([PDF 124 KB](#))
- Instructions for Waiver Requests ([PDF 34 KB](#))
- Frequently Asked Questions about the Buy American Provision ([PDF 36 KB](#))

If you have any questions about the Buy American provision, please contact buyamerican@ee.doe.gov.

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EERE Request for Information on Recovery Act Buy American Provisions



DOE is requesting information from stakeholders on questions pertaining to the Buy American provisions. See the guidelines on what to include and how to respond to the RFI ([PDF 152 KB](#)). [Download Adobe Reader](#).

This is a copy of what DOE submitted to the Federal Register for publication. Stakeholders should also refer to the Federal Register version when it is published.

- Section 1605 of the American Recovery and Reinvestment Act (Recovery Act)
- 2 CFR 176 (Government-wide guidance): “Requirements for Implementing...Section 1605”
- “None of the funds appropriated for or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a **public building or public work** unless—
 - All of the iron, steel, and manufactured goods used in the project are produced or manufactured in the United States.” (2 CFR 176.70)

Three Exceptions

1. **Nonavailability** (not produced or manufactured in sufficient and reasonably available quantities of a satisfactory quality)
2. **Unreasonable cost** (will increase cost of the *overall project* by more than 25%)
3. **Inconsistent with the public interest**

- “Instructions for Waiver Requests” document is on the website. Also encouraged to include details on page 6 of the RFI.
- ***Nonavailability Waiver Request Template*** almost ready.
- Technical information is sent to Manufacturing Extension Partnership for “supplier scouting” and to industry trade associations, unions, etc to search for domestic manufacturers.

- There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in a project, as long as the manufacturing occurs in the United States. (See 2 CFR 176.70(a)(2)(ii).
- So what constitutes “manufacturing?”
- Production or manufacturing facility is physically located in the United States or its territories. The domicile of the parent company, subsidiary, distributor, or supplier is not relevant for determining compliance with the Recovery Act Buy American provision.

- **Manufactured Good:** “Good brought to the construction site for *incorporation into the building or work* that has been processed into a specific form and shape; or combined with other raw material to create a material that has different properties than the properties of the individual raw materials.” See 2 C.F.R. § 176.140(a)(1).
- Only manufactured goods that **are permanently attached to or fixed to real property** are covered by the Buy American Recovery Act provisions.

- *Guidance on Manufactured Goods and Substantial Transformation*
- “The responsibility for determining whether the parts are components of a larger manufactured good, and whether the good is manufactured in the United States rests with the Recovery Act financial assistance recipient.”
- We have given you the tools you need
- DOE Buy American Coordinator and HQ procurement lawyers not empowered to make “substantial transformation” determinations

- What records are needed to document compliance with the Buy American provisions?
- Grantees are required to flow down the Buy American requirements to subrecipients, and in any subawards or subcontracts.
- Contractors and vendors should be held responsible for complying with the Buy American provisions.
- Grantees, sub-recipients and subawardees may ask contractors and vendors for letters of certification.

- State and local governments and tribes must follow their own procurement policies and procedures, per 10 CFR 600.236, “Procurement”, and are expected to maintain maximum oversight over their project and procurement activities with regards to Buy American compliance.
- Recipients should maintain documentation at a level they feel is appropriate to show compliance with the Recovery Act Buy American provisions.
- “Guidance on Documenting Compliance with the Recovery Act Buy American Provisions”

- A list of recommended documentation is outlined in the Guidance.
- Includes: “other reasonable documentation per the discretion of the state, local, or tribal government financial assistance recipient demonstrating compliance with the Buy American provisions.”

International Agreements

- Obligation only applies to projects valued at or above \$7,804,000.

- Many States and Sub-Federal Entities have specific exclusions from certain Agreements

- See Appendix Subpart B of 2 CFR 176

<http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>

- February 16: New U.S.—Canada agreement effective date. This gives Canada access to EECBG and SEP projects above \$7.804 million.

- For cities, municipalities, counties, and tribes Canada is the *only country* with access to EECBG projects (above \$7.8 million) under the Buy American provisions.
- No other international trade agreements (including NAFTA, CAFTA, etc) cover local government procurement.
- States can see Appendix Subpart B of 2 CFR 176 <http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>
- DOE HQ will not help interpret obligations under international trade agreements for sub-federal entities.

- Do not see how computer software could be a manufactured good.
- Software is not processed into a specific form and shape nor combined with other raw material to create a material that has different properties than the properties of the individual raw materials.
- Server virtualization software and energy efficiency software are therefore not subject to the Recovery Act Buy American requirements.

- Computer hardware: The question of whether computer hardware is covered by the Recovery Act Buy American provisions turns on whether computer hardware meets the Recovery Act definition of a *manufactured good*.
- Yes it is processed into a specific form and shape.
- But, is the the computer hardware “brought to the construction site for incorporation into the building.”
- Is it permanently attached to or fixed to real property?
- Determination must be made by the grantee.

February 11th, 2010

- LED traffic lights and signals
- Fluorescent electronic lighting ballasts
- Compact fluorescent light bulbs
- Small exceptions listed in official waiver
 - http://www1.eere.energy.gov/recovery/pdfs/buy_american_waivers.pdf
- These waivers are both retrospective and prospective. Cover all procurement past, present, and future.

May 24, 2010

Nonavailability Waiver for 7 Items:

1) Non-residential programmable thermostats; 2) commercial scale fully-automatic wood pellet boiler systems; 3) facility and small district wood pellet and chip boiler furnaces; 4) variable refrigerant flow zoning and inverter-driven ductless mini-split HVAC systems; 5) electrical “smart” strips/surge protectors; 6) gas or propane tankless water heaters up to 200,000 BTUs; 7) and fully-enclosed continuous composting systems

March 19, 2010

- Nationwide limited public interest waivers for purchases of LED lighting and HVAC units before March 31, 2010.
- The limited waivers for these two categories of manufactured goods are intended to resolve the confusion surrounding the characterization of LED lights and HVAC units as “supply” items, and thus not subject to the Recovery Act Buy American provisions.
- The concept of a “supply” item has no significance in the context of section 1605 (the Buy American provisions) of the Recovery Act.

- The concept of the “supply item” has its origins in the Buy American Act (41 U.S.C. 10a - 10d) and the Federal Acquisition Regulation (FAR), *neither of which applies to section 1605* (the Buy American provisions) of the American Recovery and Reinvestment Act of 2009 (Recovery Act; Pub. L. 111-5).
- *To be absolutely clear: the concept of a “supply item” has no relevance in the context of section 1605 of the Recovery Act.*

May 24, 2010

- “De Minimus” waiver for incidental items up to a limit of no more than 5 percent of the total cost of the iron, steel, and manufactured goods used in and incorporated into a project.

- **New Guidance and FAQs**
- Guidance on Documenting Compliance with the Recovery Act Buy American Provisions
- Guidance on Manufactured Goods and Substantial Transformation for Financial Assistance Awards
- Recovery Act Buy American Guidance on Implementing the Agreement Between Canada and the United States of America on Government Procurement
- International Trade Agreements and the Recovery Act Buy American Provisions: Frequently Asked Questions
- Computer Hardware and Software: Frequently Asked Questions
- Guidance on the Buy American Provisions as Applied to EERE Projects funded by ARRA (oldie but goodie)
- **EERE Buy American Waivers**
- *Nationwide Nonavailability Waiver for 7 Items*
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- Q: Are LED streetlights a “supply item”, and thus exempt from “Buy American” requirements?
- A: No. The concept of a “supply item” has no relevance in the context of section 1605 of the Recovery Act. There are U.S. manufacturers of LED streetlights and area lights.
- Q: How do we find products that comply with the “Buy American” requirement?
- A: DOE is compiling a list of manufacturing trade associations. We cannot provide a list of specific manufacturers.

- Q: If the ARRA funds are mixed with non-ARRA funds into one contract for the same “project,” do the Buy American provisions apply to the entire pool of funds?
- A: If the funds are combined for the same “project,” then yes. There are strategies to ensure funds remain separate, segregable, etc. EERE is working on guidance on the definition of “project.”
- We want to leverage non-ARRA capital.

- Q: A project receives ARRA funding after having been through the budgeting and contracting phase. Is the entire project now required to comply with the Buy American requirements, even retroactively?
- A: Good candidate for a “public interest” waiver.
- **FAQ resources exist; EECBG searchable FAQ database; new FAQ document on its way shortly.**

Thank You

- Additional questions can be submitted to:
buyamerican@ee.doe.gov
- Website:
http://www1.eere.energy.gov/recovery/buy_american_provision.html